Ong Thuan Ming v VTI Vintage Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D8–24–395 OF 2008
KANG HWEE GEE J
12 FEBRUARY 2009

Civil Procedure — Injunction — Interlocutory mandatory injunction — Interlocutory mandatory injunction, application for — Balance of convenience — Whether damages adequate remedy

The plaintiff was employed as the managing director of all the four defendants ('the Vintage Group') and in the course of his employment had entered into eight guarantees to secure hire purchase loans for the purchase of seven cars and machineries. In addition the plaintiff was also a guarantor of an overdraft loan granted by Affin Bank to the third defendant. From 31 October 2007 the plaintiff ceased to be a managing director of the Vintage Group leaving the guarantees, which he stood in favour of the defendants, outstanding. He then presented a winding up petition against the first and second defendant for debts due to the plaintiff. Subsequently the parties entered into a settlement agreement ('the agreement') whereby it was agreed that the Vintage Group would undertake to discharge the plaintiff from his obligations. Clause 4.2 of the agreement specifically provided that the Vintage Group would discharge the plaintiff's guarantees within 60 days from the date of the agreement. The plaintiff's obligation under the agreement was to withdraw the winding up petition that he had filed against the first and second defendants. The plaintiff claimed that although he had performed his obligation under the agreement the defendants had not done their part in effecting the discharge of the plaintiff's obligation to the banks on the guarantees. The plaintiff had therefore filed this originating summons application for, inter alia, specific performance of cl 4.2 of the agreement and an injunction to force the third defendant to cease from utilising the banking facility and for the defendants not to default in the eight hire purchase agreements of which he had stood as guarantor. The defendants claimed that that they did not know the commencement date of the agreement as they had no knowledge that the agreement was executed and that in any case, they had written to the banks for the procedure to uplift the guarantees. The defendants also submitted that the agreement itself restricts the remedy of the

A plaintiff and that the plaintiff's application went against the spirit of the agreement. The plaintiff maintained that the balance of convenience lay in favour of the plaintiff primarily because damages were not an adequate remedy for the plaintiff. Further, the plaintiff submitted that the defendants' act of merely writing to the bank to discharge the plaintiff from being the B guarantor without more was inadequate.

Held, dismissing the application with costs:

C (1) The injunction sought by the plaintiff was in effect an interlocutory mandatory injunction and the court was more stringent in granting such an injunction. In fact a court would not grant such an injunction where damages would provide adequate remedy (see para 42).

D (2) The balance of convenience lay in favour of not granting the injunction sought by the plaintiff. The effect of preventing the defendants from the use of the banking facilities would have the inevitable effect of crippling their business as against the effect of plain monetary loss as a result of the alleged non-performance of the defendants' obligation to discharge E the plaintiff from being guarantors (see para 43).

[Bahasa Malaysia summary

Plaintif telah digaji sebagai pengarah urusan keempat-empat defendan F ('Vintage Group') dan sepanjang tempoh pekerjaannya telah memasuki lapan jaminan untuk mendapatkan pinjaman untuk menjamin sewa beli tujuh buah kereta dan jentera-jentera. Tambahan plaintif adalah juga seorang penjamin bagi satu pinjaman overdraf yang diberikan oleh Affin Bank kepada defendan ketiga. Mulai 31 Oktober 2007 plaintif tidak lagi menjadi pengarah G urusan Vintage Group dan meninggalkan jaminan-jaminan tersebut, yang berpihak kepada defendan-defendan, tertunggak. Dia kemudiannya mengemukakan petisyen penggulungan terhadap defendan pertama dan kedua untuk hutang-hutang yang perlu dibayar kepada plaintif. Kemudian pihak-pihak telah memasuki satu perjanjian penyelesaian ('perjanjian') di H mana telah dipersetujui bahawa Vintage Group akan mengaku janji untuk melepaskan plaintif daripada kewajipan-kewajipannya. Klausa 4.2 perjanjian khususnya memperuntukkan bahawa Vintage Group akan melepaskan jaminan-jaminan plaintif dalam tempoh 60 hari daripada tarikh perjanjian. Kewajipan plaintif di bawah perjanjian itu adalah untuk menarik balik I petisyen penggulungan yang telah difailkan terhadap defendan-defendan pertama dan kedua. Plaintif mendakwa bahawa walaupun dia telah melaksanakan kewajipannya di bawah perjanjian tersebut defendan-defendan gagal untuk melakukan bahagian mereka dalam melepaskan kewajipan plaintif terhadap bank untuk jaminan-jaminan. Oleh itu plaintif telah

memfailkan permohonan saman pemula ini untuk, antara lain, pelaksanaan spesifik klausa 4.2 perjanjian tersebut dan satu injunksi untuk memaksa defendan ketiga untuk berhenti daripada menggunakan kemudahan perbankan dan untuk defendan-defendan supaya tidak ingkar dalam lapan perjanjian-perjanjian pembelian sewa beli yang dijaminnya. Defendan-defendan mendakwa bahawa mereka tidak tahu mengenai tarikh permulaan perjanjian tersebut kerana mereka tidak mempunyai pengetahuan bahawa perjanjian tersebut telah dimeterai dan walau bagaimanapun, mereka telah menulis kepada bank-bank untuk prosedur bagi meningkatkan/membatalkan jaminan-jaminan tersebut. Defendan-defendan juga menghujahkan bahawa perjanjian tersebut sendiri menghadkan remedi plaintif dan permohonan plaintif ini menentang semangat perjanjian tersebut. Plaintif mempertahankan kenyataannya bahawa imbangan kemudahan berpihak kepada plaintif terutamanya kerana tuntutan kerugian bukanlah satu remedi yang mencukupi untuk plaintif. Selanjutnya, plaintif menghujahkan bahawa tindakan defendan-defendan yang hanya menulis kepada bank untuk melepaskan plaintif daripada menjadi penjamin adalah tidak memadai.

Diputuskan, menolak permohonan dengan kos:

(1) Injunksi yang dipohon oleh plaintif adalah satu injunksi interlokutori mandatori dan mahkamah adalah lebih tegas dalam memberikan seperti injunksi sedemikian. Malahan mahkamah tidak akan membenarkan seperti injunksi sedemikian di mana ganti rugi akan memberikan remedi yang mencukupi (lihat perenggan 42).

(2) Imbangan kesenangan adalah berpihak kepada tidak membenarkan injunksi yang dipohon oleh plaintif. Kesan menghalang defendan-defendan daripada menggunakan kemudahan perbankan akan membawa kepada akibat yang tidak dapat dielakkan iaitu melumpuhkan perniagaan mereka berbanding dengan kesan kehilangan kewangan hasil dakwaan ketidakpatuhan kewajipan defendan-defendan untuk melepaskan plaintif daripada menjadi penjamin (lihat perenggan 43).]

Notes

For cases on interlocutory mandatory injunction, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3400–3414.

Cases referred to

Jakeman v South West Thames Regional Health Authority [1990] IRLR 62 (refd)

A *MBf Holdings Bhd v East Asiatic Company (M) Bhd* [1995] 3 MLJ 49; [1995] 4 CLJ 73, HC (refd)

Khabir Dhillon (David Soosay with him) (Soosay Dhillon Sharma) for the plaintiff.
B *M Menon (Swinder Singh with him) (Jaffar & Menon) for the first and second defendants.*
Stanislaus (MS Vethanayagam & Associates) for the third and fourth defendants.

Kang Hwee Gee J (delivering oral judgment ex tempore):

C

[1] This is an application (encl 4) by the plaintiff for the following orders:

(1) Defendan-defendan dilarang daripada menggunakan apa-apa fasiliti
D pinjaman yang diambil oleh mana-mana defendan-defendan yang digerentikan oleh plaintif sehingga lupusnya tindakan ini, termasuk tetapi tidak terhad kepada fasiliti 'overdraft' yang diambil oleh defendan ke-3 dengan Affin Bank Berhad.

(2) Defendan-defendan diarahkan untuk memastikan bahawa kesemua
E fasiliti pinjaman yang diambil oleh mana-mana defendan yang digerentikan oleh plaintif diselenggarakan dengan teratur sehingga tindakan ini dilupuskan.

(3) Defendan-defendan dalam masa 7 hari memfailkan satu afidavit yang
F memberikan butiran mengenai status terkini (termasuk wang yang terhutang) berkenaan fasiliti-fasiliti pinjaman yang diambil oleh defendan-defendan daripada Affin Bank Berhad, Maybank, EON Bank dan Ambank.

G (4) Kos permohonan ini dijadikan dalam kausa.

(5) Apa-apa perintah atau relif lain yang mahkamah yang mulia ini anggapkan adil.

H **[2]** The plaintiff was employed by all the four defendants in a group of companies as their managing director and in the course of his employment had signed eight guarantees to secure hire purchase loans given by financial institutions to the first, second and third defendants in respect of the hire purchase of seven cars and machineries. The plaintiff is also a guarantor of an
I overdraft loan granted by Affin Bank to the third defendant.

[3] The plaintiff ceased to be the managing director of all the defendants (Vintage Group) and ceased to be a director on the board of the four defendants effective 31 October 2007.

[4] The plaintiff then presented winding up petitions against the first defendant and also against the second defendant for debts due to the plaintiff. Subsequently the parties entered into a settlement agreement whereby under cl 4.2 of the agreement:

> Vintage Group undertakes to discharge Ong's guarantees within sixty (60) working days of the date of this agreement.

[5] The person Ong referred to in cl 4.2 of the agreement is Ong Thuan Ming the plaintiff.

[6] Subsequently following a dispute on the performance of cl 4.2 the plaintiff filed the present originating summons for specific performance of cl 4.2.

Mr David Soosay for the plaintiff

(1) The plaintiff was the managing director of all the defendants until October 2007. The plaintiff left all the companies on 31 October 2007 leaving the guarantees which he stood in favour of the defendants outstanding.

(2) On 24 April 2008 following negotiations the plaintiff entered into a settlement agreement which provides as follows:

> SETTLEMENT AGREEMENT
>
> THIS AGREEMENT made the 24 April 2008
>
> Between
>
> Ong Thuan Ming ('Ong') (NRIC No. 750611–14–5683) of Block G 04–03, Seri Kasturi Apartment, Jalan BK 3/7, Bandar Kinrara, 58200 Kuala Lumpur
>
> And
>
> The 'Vintage Group', which consists of:
>
> (1) VTI Vintage Berhad;
>
> (2) Vintage Tiles Industries Sdn Bhd;
>
> (3) Vintage Roofing & Construction Sdn Bhd; and/or
>
> (4) Vintage Tiles Holdings Sdn Bhd
>
> Of Wisma Vintage, No 10, Jalan 2/109E, Desa Business Park, 58100 Kuala Lumpur, Malaysia
>
> 1. This agreement is for the settlement of the ongoing dispute between the parties, specifically:

1.1 Kuala Lumpur High Court, Winding-Up Petition No: D8–28–137–2008

1.2 Kuala Lumpur High Court, Winding-Up Petition No: D8–28–211–2008

2. Vintage Group will immediately issue and deliver cheques for the following amounts (dates and drawers also stated) to Ong's Solicitors, Messrs. Soosay Dhillon Sharma. Upon receipt of the cheques, Ong undertakes to file, within two days, Notices of Motion together with Certificates of Urgency applying to withdraw the Petitions hereinbefore mentioned in clause I above:

2.1 RM 65,000 dated 28 April 2008 from Vintage Tiles Industries Sdn Bhd

2.2 RM100,000 dated 31 May 2008 from VTI Vintage Berhad

2.3 RM100,000 dated 30 June 2008 from Vintage Tiles Industries Sdn Bhd

2.4 RM 50,000 dated 31 July 2008 from Vintage Tiles Industries Sdn Bhd

3. Vintage Group will transmit to Ong ownership of the vehicle described as Mercedes E240, Reg No WNM 8805 ('the vehicle') in the following manner:

3.1 Vintage Group will immediately surrender possession of the Vehicle to Ong;

3.2 Vintage Group grants Ong an irrevocable licence to use the same;

3.3 Vintage Group will transfer title of the Vehicle to Ong, free of encumbrances, within twenty four (24) months of the date of this agreement.

3.4 Vintage Group undertakes not to deal in any way with the Vehicle, nor to do any act which may result in interference with Ong's quiet enjoyment of the same.

3.5 In the event that Vintage Group breaches any of cll 3.1—3.4 above, Ong will be entitled to specific performance of the same and while the action for specific performance is adjudicated, Ong will be entitled to interlocutory injunctive relief granting him possession of the Vehicle and preventing any interference in his right to ownership of the same.

3.6 For the avoidance of doubt:

(a) Ong will be liable for all statutory offences in relation to his use of the Vehicle and shall indemnify the Vintage Group against all claims, damages, loss and expenses arising from that use; and

(b) While using the Vehicle, Ong will maintain and insure the vehicle at his own cost and expense.

4. In regard to the guarantees given by Ong for loans to the Vintage Group:

4.1 Vintage Group, jointly and severally, indemnifies Ong against all direct and indirect losses suffered by Ong due to the same and this indemnity shall subsist until Ong is discharged from all the guarantees.

4.2 Vintage Group undertakes to discharge Ong's guarantees within sixty (60) working days of the date of this Agreement.

5. VTI Group also indemnifies Ong against all financial losses suffered by him which are directly or indirectly caused by:

5.1 Any claim made by any third party against Ong, arising from Ong's previous position as an employee and/or director of the VTI Group, save for any claim involving an element of dishonesty on Ong's part.

5.2 Any financial quantifiable sanctions imposed on Ong by any regulatory authority due to Ong's position as an employee and/or director of the VTI Group, save for those involving an element of dishonesty on Ong's part.

6. Upon receipt of the monies paid via the cheque in 2.1 above and possession of the Vehicle as stated in 3.1 above, Ong will commence withdrawal of the proceedings in 1.1. and 1.2 above, with no order as to costs. Upon completion of all of Vintage Group's obligations under this agreement, Ong will not have the liberty to re-file any proceedings with respect to the dispute.

7. This is a full and final settlement of the dispute between the parties and they will have no further claims against each other arising out of and relating to Ong's position as a director/employees of Vintage Group, save for those which arise pursuant to this agreement.

8. This agreement embodies the complete agreement between the parties and its terms must be interpreted according to their ordinary meaning. No reference may be made to extrinsic matters

A in order to establish any collateral contract nor any representations, save for the following:

8.1 The signatories represent that they have full authority to enter into this agreement. To this end, copies of board resolutions
B authorizing the execution of this agreement by the relevant director are enclosed.

8.2 The parties represent that they have the legal right to deal with the assets mentioned in this agreement.

C 9. Time is the essence of this agreement and all obligations set out above are joint and several, where applicable.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above written.

D SIGNED by Ong Thuan Ming in the presence of:-)

Sgd.

SIGNED by VTI Vintage Berhad in the presence of:-)

Sgd.

E Director

Sgd.

MURALEE MENON

F ADVOCATE & SOLICITOR

KUALA LUMPUR.

SIGNED by Vintage Tiles Industries Sdn Bhd in the presence of:-)

Sgd.

G Director

Sgd.

MURALEE MENON

H ADVOCATE & SOLICITOR

KUALA LUMPUR.

SIGNED by Vintage Roofing & Construction Sdn Bhd in the presence of:-

I Sgd.

Director

Sgd.

MURALEE MENON

ADVOCATE & SOLICITOR

KUALA LUMPUR.

(3) The plaintiff had performed his obligation under the Settlement Agreement in full by withdrawing the Kuala Lumpur High Court Winding-Up Petition D8–28–137–2008 and another Kuala Lumpur High Court Winding-Up Petition D8–28–211–2008.

(4) All that the defendants had done to effect the discharge of the plaintiff's obligation to the banks on the guarantees was to write to the bank without more.

Mr M Menon for the first and second defendants

(1) Plaintiff is a shareholder of the first defendant public listed company. The agreement between the plaintiff and the defendants was signed on 25 April 2008 and delivered to the plaintiff's solicitor on 25 April 2008. When the document was sent to the defendants' solicitor it was unexecuted by the plaintiff. The defendants had no knowledge that the settlement agreement was dated 24 April 2008. The first defendant came to know of the settlement agreement date when encls 1 and 4 were served on the defendants. Submit that the commencement date of the defendants' obligation was uncertain as the plaintiff had agreed by their letter of 18 April 2008 to execute the settlement agreement and deliver six copies to the defendants' solicitor which they failed to do despite various requests.

(2) When the plaintiff negotiated the settlement agreement the accounts of the defendants' companies were frozen by the bank. In order to uplift the freeze parties had negotiated that the fair orders of the winding-up withdrawal orders to be provided to the defendants' solicitor until to date they had failed to give us those orders. This was made known by way of solicitor's letters to this court.

(3) The defendants have complied with all the terms of the settlement agreement including that of the defendants' action in discharging the guarantees. See defendants' letters to the bank asking financial institutions for the procedure to uplift the guarantees. None of the institutions had in fact told us the procedure for uplifting the guarantees. We cannot do anything until we know when the agreement is dated. Despite that on the 10 July 2008 the defendants had requested the various financial institutions on the upliftment procedure. Submit that the guarantees are principally an agreement between the bank and the plaintiff. It is a security for loans granted by the bank to the defendants. The bank is not a party in this action and we cannot make

any orders affecting the security of the bank right now as any orders would adversely affect the bank.

(4) The orders sought also contradict the terms of the settlement agreement because by cl 3 read together with cl 3.3 the plaintiff recognises that the car that was surrendered to the plaintiff by the defendants was under a hire purchase financing. The unencumbered car under cl 3.3 is to be transferred within 24 months of the date of the agreement. As such he is estopped by this agreement from seeking this relief as he was fully aware that the hire purchase agreement was secured by his guarantee. In order to protect his interest cl 3.5 of the settlement agreement gives the plaintiff his relief. The injunction order would trigger a default because in effect they are asking for an order to freeze the facilities which would in turn result in the bank calling on the guarantees and recalling on the facilities.

(5) Parties had when entered the settlement agreement by cl 4 also envisaged a situation if the guarantees are not discharged by the bank. In cl 4.1 of the settlement agreement, the defendants provide a full indemnity to the plaintiff until discharge from all guarantees. Further the plaintiff has not shown one iota of evidence that the facilities are in default. As such this action is premature.

(6) The originating summons itself is doomed to failure when the court at this juncture cannot make an order against the defendants for discharge of guarantees as they did not issue those guarantees.

(7) The plaintiff by a letter dated 30 October 2008 to the court had in fact admitted that events have overtaken the application for interlocutory relief. By this they have in fact admitted there is no need for any interlocutory relief.

(8) The agreement dated 24 April 2008 itself restricts the remedy of the plaintiff. The first remedy is found in cl 3.5 and the second remedy by way of indemnity is found in cl 4.1. Thus this application goes against the spirit of the agreement.

(9) Clause 8 of the agreement is referred wherein the terms must be interpreted according to the ordinary meaning. I referred to the cl 8 because of my earlier submission in para 4 above.

Mr Stanislaus for the third and fourth defendants

I adopt the submission of Mr M Menon.

In addition the following:–

(1) The agreement was stamped on 22 September 2008 and there is no

witness to the plaintiff's signature. The plaintiff's signature is different from his signature in the petition filed before this court.

(2) Even if there is a breach, damages is an adequate remedy.

Reply by Mr Khabir Dhillon for the plaintiff

(1) There is a serious issue to be tried as the defendants had failed to comply with cl 4.2 of the settlement agreement in failing to discharge the plaintiff from the nine guarantees by the end of the sixty working day period which ended on 21 July 2008. We have not only proved prima facie not only a serious issue to be tried but a very strong likelihood of the defendants having been in default

(2) Balance of convenience is in favour of the plaintiff for the following reasons:

(i) Damages are not an adequate remedy for the plaintiff — first, the very nature of a guarantee is for the plaintiff to pay on behalf of defendants in the event they are unable to discharge their loans to the bank. In such a case it is impossible to recover any damages due from the defendants as it is clear even at this stage that the defendants could not discharge the loan in order to relieve the plaintiff of his singular obligation under the guarantee. Second, the continuing existence of guarantee by the plaintiff for loans taken by the defendants hangs like a sword of Damocles over the plaintiff. This is psychological in nature which cannot be compensated by award of damages more so the plaintiff had left his position where he is able to control the destiny of the company.

(ii) The plaintiff should not be made to incur further liability specifically on the overdraft facility the benefit of which only the defendants could continue to enjoy.

(iii) There is a high likelihood of the plaintiff being left to shoulder the burden of the loan — first, the defendants lack bona fide because they only first wrote to the bank to uplift the guarantee on the fiftieth day of the sixty working day period as prescribed by cl 4.2 of the agreement. Second, no evidence has been given by the defendants that after this action was filed steps were taken to comply with cl 4.2. In fact defendants retaliated by accusing the plaintiff of breach of trust in a publication to the securities commission and a police report after the plaintiff sued them. Third, the defendants' affidavit lack candor. Paragraph 10.2 of defendants' opposing affidavit encl 14 states that the business of the first and second defendants would close down if the injunction

A order is granted but on the contrary by the same paragraph admitted that the defendants have more than one facility. Further although the defendants had stated in their affidavit that attempts are continuing to discharge the plaintiff as guarantor but no evidence is given to support what they said. And fourth, to-date in
B all their affidavits filed in this proceeding the defendants have avoided disclosing the status of those loans nor showing that they were regularly maintained and no excessive drawdown has been made on the overdraft facility. There is high likelihood that the defendants are drawing down on the overdraft on the detriment of
C the plaintiff.

(3) The agreement was concluded on the 24 April 2008. This is apparent from the correspondence between the plaintiff's and the defendants' solicitors specifically the letter dated 24 April 2008 from the
D plaintiff's solicitor exh 'C' of encl 20. Dating of the contract is a non-issue.

(4) The agreement which the plaintiff signed with the defendants does not require the plaintiff to give the defendants a sealed order. Evidence of the agreement is from exh 'OTM-1' of encl 8. Clause 6
E deals with the withdrawal of the winding up petition and does not provide for the service of the sealed order.

(5) By merely writing to the bank to request them to provide the procedures to discharge the plaintiff from being guarantor as their
F letter dated 10 July 2008 indicates, without more is inadequate. The undertaking in cl 4 is absolute and not on the best endeavour basis.

(6) We did not cite the bank as a party because we are not taking any action against the bank.
G

(7) We are not seeking an order for the cars to be transferred to the plaintiff but for the guarantees to be discharged.

(8) Clause 4.1 is an indemnity that subsists until the plaintiff is discharged from all the guarantees. The duty to indemnify the
H plaintiff is clear from cl 4.1:

> Vintage Group, jointly and severally, indemnifies Ong against all direct and indirect losses suffered by Ong due to the same and this indemnity shall subsist until Ong is discharged from all the guarantees.

I

(9) We did not abandon the present interlocutory relief sought in this application. Our letter merely seeks to have the originating summons heard urgently on the grounds of saving in time and cost as it only involves the interpretation of cl 4.2.

(10) We did not in the settlement agreement abandon or restrict our right to seek specific performance of cl 4.2.

Reply by Mr M Menon for the first and second defendants

(1) Serious question to be tried — no such question as the action is premature. The dating of the agreement is important because under cl 9 time is of the essence and the agreement is not dated at all thereby raising the question of when time starts to run. Only subsequently after this present originating summons had been filed on 23 September 2008 and served, did the plaintiff delivered the stamped and dated agreement to the defendants' solicitors. Without knowing the beginning or the ending date of sixty days within which the defendants are supposed to comply with cl 4.2 this originating summons is premature and therefore the injunction sought for cannot be granted.

(2) The first order seeks to restrain the defendants from utilising any of the banking facilities and in this case they involved the eight hire purchase agreements which had already been utilised and the overdraft facility which is ongoing. Submit that the eight hire purchase agreements are ex post facto. In respect of the overdraft facility it was never in the contemplation of the parties that the defendants would be required to redeem the facility. What the plaintiff is now seeking is to force the defendants to redeem the facility. Prayer 1 is an act of oppression and not what equity would allow to be ordered. The defendants were never in default of their loan and hire purchase repayment. There is no reason to grant this injunction.

(3) Under the settlement agreement the defendants paid the plaintiff a cash sum of RM315,000 and had handed over the possession of a Mercedes E-240 car with the defendants continuing to pay the monthly hire purchase installment until the loan is settled. This shows the defendants had been acting in good faith to comply with their obligation under cl 4.2.

(4) The second order seeks to compel the defendants to maintain a proper utilisation of the facilities obtained by the defendants pending the disposal of the originating summons. But plaintiff has not shown any evidence that the facilities had been improperly utilised to enable the court to act.

(5) The third order seeks to compel the defendants to provide an account of indebtedness to the various financial institutions. But we are not dealing with the accounts of the defendants. This order should not be made simply because the plaintiff had not shown the defendants why

A he could not obtain this information from the various financial institutions himself being a guarantor to the facilities and the plaintiff had not shown that the defendants had defaulted also.

(6) Balance of convenience:

B (i) the defendants' company is a going concern;

(ii) the plaintiff had not come to the court with clean hands. Subsequent to the settlement agreement the defendants discovered various malpractices resulting in the police report that was lodged against the plaintiff which appeared in exh 'KST-4' in encl 17 filed before this hearing starts on 17 November 2008.

C

(7) Psychological trauma is not a factor in considering the balance of convenience. The plaintiff enjoyed the fruit of the loan taken by the defendants at the material time.

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(8) Benefits enjoyed by both the plaintiff and the defendants as members of the company.

(9) The defendants had separate and distinct facilities and thus have disclosed material facts whereas the plaintiff has not disclosed the facts leading to him being terminated as the managing director. That lacks frankness and candor.

E

(10) There is no necessity to expressly state in any document that the orders must be taken out and served. In any event by exh 'KST-9' encl 14 the plaintiff was reminded to forward the order but till today he failed to do so.

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(11) If the court orders that the defendant is prohibited from using the banking facilities then the defendant's business would in effect be jeopardised and irreparable damages would be caused to the defendant.

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Mr Khabir Dhillon for the plaintiff

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(1) The defendants in their affidavit, their submissions on 1 December 2008 and on 11 December 2008 insist that there is no breach of the facilities. However, the plaintiff's fifth affidavit provides conclusive proof of the breach of the overdraft facility and its recall by way of exh 'OTM-14'. This has not been rebutted.

I

FINDINGS AND DECISION

[7] The injunction sought by the plaintiff in this application is in effect an

interlocutory mandatory injunction to force the third defendant to cease from utilising its banking facility with the four banks and not to default its instalment payment on the eight hire purchase agreements taken by the defendants of which he had stood as guarantor.

[8] The grant of an interlocutory mandatory (or prohibitory) injunction is more stringent. Per KC Vohrah J (as he then was) in *MBf Holdings Bhd v East Asiatic Company (M) Bhd* [1995] 3 MLJ 49; [1995] 4 CLJ 73 (HC) at p 76:

> The ordinary *American Cyanamid* principles are not applicable in an application for a mandatory injunction. In the case of a mandatory interlocutory injunction for its grant there must be a high degree of assurance that at the trial it will appear that the injunction was rightly granted (*Shepherd Homes Ltd v Sandham* [1971] Ch 340; *Locabail International Finance Ltd v Agroexport* [1986] 1 WLR 657). This is far more than is required for a prohibitory injunction to which the *American Cyanamid* principles apply. As put by LA Sheridan (*ibid*, p 35).
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> > That may be no more than a way of saying that the balance of convenience is more often against a mandatory injunction than it is against a prohibitory injunction at the interlocutory stage because an interlocutory mandatory injunction is more likely to involve the defendant in expenditure, more likely to be the final determination of the dispute and more difficult to compensate if the defendant wins at the trial.
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> In *Jakeman v South West Thames Regional Health Authority* [1990] IRLR 62, Auld J said that in the absence of special circumstances an interlocutory mandatory injunction would not be granted unless the case was clear and one which should be decided at once.

[9] A contract is essentially a bargain with commercial elements of which the remedy for its breach is damages. A court will not grant an interlocutory injunction where damages would provide adequate remedy — a fortiori where the injunction is mandatory in nature as in the present case.

[10] Moreover the balance of convenience lies in favour of not granting the injunction sought for by the plaintiff. The effect of preventing the defendants from the use of the banking facilities would have the inevitable effect of crippling their business as against the effect of plain monetary loss as a result of the alleged non performance of the defendants' obligation to discharge the plaintiff from being guarantors.

A **[11]** The application is dismissed with costs.

Application dismissed with costs.

B Reported by K Nesan

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